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No. 83-1663

In the Supreme Court of the United States

OCTOBER TERM, 1983

ALAN H. SCHAFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court retained jurisdiction to reduce petitioner's sentence seven months after the 120-day period specified under Fed. R. Crim. P. 35(b) for the granting of such relief had expired.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Klimas v. *State*, 75 Wis.2d 244, 249 N.W.2d 285	7
Leyvas v. *United States*, 371 F.2d 714	9
People v. *District Court*, 636 P.2d 689	7
Sotto v. *Wainwright*, 601 F.2d 184, cert. denied, 445 U.S. 950	8
State v. *Adirim*, 376 So. 2d 464	7
State v. *Upham*, 439 A.2d 912	7
State ex rel. Bryan v. *McDonald*, 642 S.W.2d 492	7
State ex rel. Owens v. *Hodge*, 230 Kan. 804, 641 P.2d 399	7
Thompson v. *United States*, cert. denied, No. 83-5224 (Nov. 7, 1983)	7
United States v. *Addonizio*, 442 U.S. 178	6, 8, 10
United States v. *DeMier*, 671 F.2d 1200	7, 9, 10
United States, Ex parte, 242 U.S. 27	8, 10
United States v. *Inendino*, 655 F.2d 108	8, 9, 11
United States, In re, 588 F.2d 56, cert. denied, 441 U.S. 909	7
United States v. *Johnson*, 634 F.2d 94	7
United States v. *Kajevic*, 711 F.2d 767, cert. denied, No. 83-5536 (Jan. 9, 1984)	7, 11
United States v. *Krohn*, 700 F.2d 1033	7, 11
United States v. *Mendoza*, 581 F.2d 89, adopting 565 F.2d 1285	6, 7
United States v. *Nunzio*, 430 A.2d 1372	7
United States v. *Pollack*, 655 F.2d 243	7

Cases—Continued: Page

United States v. *Rice*, 671 F.2d 455 7
United States v. *Robinson*, 361 U.S. 220 8
United States v. *Smith*, 650 F.2d 206 7
United States v. *Stollings*, 516 F.2d 1287 .....5, 7, 8, 9

Statutes and rules:

18 U.S.C. 371 2
18 U.S.C. 1341 2
18 U.S.C. 4205(b)(2) 2
18 U.S.C. 4206(c) 2-3
Fed. R. Crim. P.:
Rule 35 .....*passim*
Rule 35(b) 2, 6, 7, 11
Rule 35 advisory committee note 11
Rule 45(b) 2, 6
D.C. Super. Ct. R. 35(b) 7

Miscellaneous:

Moore, *Moore's Federal Practice* (2d ed. 1983)..... 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 726 F.2d 155. The order of the district court reducing sentence is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1984. A petition for rehearing was denied on March 5, 1984 (Pet. App. B). The petition for a writ of certiorari was filed on April 11, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, the central figure in a vote fraud scheme, pleaded guilty in the United States District Court for the District of South Carolina to two counts of mail fraud (Counts 3 and 4) and one count of conspiracy (Count 1), in violation of 18 U.S.C. 371 and 1341 (II C.A. App. 5-8).[1] On November 24, 1981, he was sentenced to 42 months' imprisonment, to be followed by five years' probation, and was fined a total of $12,000 (I C.A. App. 22).

On March 19, 1982—115 days after sentence was imposed—petitioner filed a motion to have his sentence reduced pursuant to Fed. R. Crim. P. 35(b) (I C.A. App. 27-28).[2] On October 22, 1982—more than seven months later—the district court reduced petitioner's sentence to one year's imprisonment (I C.A. App. 63-69). On appeal by the government, the court of appeals reversed the district court's sentence reduction order and remanded for reinstatement of the original sentence (Pet. App. 9-10).

1. Petitioner commenced service of his sentence on December 14, 1981 (I C.A. App. 22), and was accorded a parole hearing the following month. See 18 U.S.C. 4205(b)(2). On February 19, 1982, the Parole Commission's Regional Office found that there

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[1] Pursuant to a plea agreement, 14 additional counts charging petitioner with mail fraud (Counts 2, 5-16) and obstruction of justice (Count 17) were dismissed (I C.A. App. 20-22).

[2] In pertinent part, Rule 35(b) provides:

> The court may reduce a sentence within 120 days after the sentence is imposed * * *, or within 120 days after entry of any order of judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction.

This time limit may not be extended (Fed. R. Crim. P. 45(b)).

was "good cause" (18 U.S.C. 4206(c)) to extend petitioner's presumptive release date beyond that suggested in the parole guidelines; this determination was based in part on the conduct underlying the charges that were dismissed pursuant to the plea agreement (I C.A. App. 39-40).[3]

Petitioner appealed this order to the Parole Commission's National Appeals Board (I C.A. App. 64) and also moved the district court to reduce his sentence (*id.* at 27-28). In his motion, petitioner argued that the Parole Commission's action requiring him to serve 18 months of his sentence was improper since it exceeded the Commission's own guidelines and undermined the court's sentencing intentions (*ibid.*). In particular, petitioner complained that the Parole Commission had improperly taken account of the dismissed obstruction of justice charge in arriving at its presumptive release date (*id.* at 33-36).

On April 28, 1982—five weeks after the expiration of the time period set forth in Rule 35—the district court entered an order scheduling a hearing on petitioner's motion for May 14, 1982 (I C.A. App. 44-

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[3] Since the offenses were of "moderate" severity and since petitioner's salient factor score was the highest possible, the parole guidelines indicated that incarceration for a period of 10-14 months was normally appropriate (I C.A. App. 39). After reviewing "all relevant factors and information presented," however, the Regional Parole Commissioner ordered petitioner "[c]ontinue[d] to a presumptive parole after service of 18 months" (I C.A. App. 39-40) because he was

> considered to be one of the most culpable in the offense behavior and * * * played a leadership role in the offense which consisted of mail fraud, vote buying, and obstruction of justice involving candidates for county offices and the U.S. Congress; and the corruption of the state and federal political system.

47). In addition, the court directed counsel to consider whether it was "appropriate for the Court to [reduce a sentence] merely because it may disagree with the Parole Commission ruling on the presumptive release date" and whether it was "appropriate * * * to enter an order reducing a sentence where an appeal from an administrative ruling (a ruling on a presumptive parole date) is pending and undetermined" (*id.* at 46). In its response, the government stated that petitioner's motion should be denied since "[a]ctions taken by the U.S. Parole Commission, which may not be in accord with a trial judge's expectations at the time of sentencing, do not provide a basis for collateral attack" (*id.* at 59). Petitioner urged that it was permissible for the court to rule immediately on his Rule 35 motion, despite the pending administrative action (I C.A. App. 48-52). After the hearing, the court postponed action on petitioner's motion until the completion of the administrative proceedings (*id.* at 61; II C.A. App. 49-52). The Regional Parole Commissioner's order was affirmed by the National Appeals Board on August 3, 1982 (I C.A. App. 64).

2. On October 22, 1982, seven months after the expiration of Rule 35's 120-day time limit, the district court reduced petitioner's sentence "to the time served * * * as of December 14, 1982," *i.e.*, to one year's imprisonment (I C.A. App. 63-69).[4] Although agreeing "that the Parole Commission may properly consider the character of the offense *for which the defendant was convicted and sentenced* in processing

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[4] Because petitioner's motion had been filed before expiration of the 120-day time limit, the district court held that it retained jurisdiction to act on it (I C.A. App. 65-67; see also *id.* at 98).

a parole application," the court stated that it was improper for the parole authorities "to consider a count of the indictment which was never tried and to which no plea of guilty was ever interposed" (I C.A. App. 65 (emphasis in original)). Since the Commission's reliance on petitioner's conduct underlying the dismissed counts of the indictment constituted the "only significant reason" for setting a presumptive release date beyond the recommended guidelines, the court concluded that it was "appropriate to correct the injustice of the Parole Commission's action" by reducing petitioner's sentence to a time within the parole guidelines (*id.* at 67-68). And, in so doing, the court held that it could grant relief under Rule 35 even though "recognizing its lack of jurisdiction by way of judicial review" to monitor the release decisions of the Parole Commission (*id.* at 68 (footnote omitted)).

3. The court of appeals reversed (Pet. App. 1-10). At the outset it reiterated its holding in *United States* v. *Stollings*, 516 F.2d 1287 (4th Cir. 1975), that Rule 35's time limitation is "not * * * mechanical," and that district courts may retain jurisdiction beyond 120 days over a timely filed motion "where delay is based upon reasonable grounds" (Pet. App. 5-7). But because "the trial judge purposely delayed consideration of the motion before him until seven months after the deadline in order to review the Parole Commission's decision," the court of appeals concluded "that the delay was unreasonable and the court was without jurisdiction" (*id.* at 8-9). It therefore vacated the order reducing petitioner's sentence (*id.* at 9-10).

ARGUMENT

In holding that the district court exceeded its jurisdiction in reducing petitioner's sentence, the court of appeals based its decision on the unexceptional view —shared by all of the circuits—that at a minimum the trial court must act on Rule 35(b) motions within a "reasonable" time after the 120-day limitation period has expired. Nonetheless, petitioner contends (Pet. 6-11) that there is general uncertainty as to whether Rule 35 sets merely a filing deadline or a limitation on granting relief and, in addition, that there is a conflict in the circuits as to what constitutes a "reasonable" delay. As we show below, further review of these interrelated contentions is unwarranted in this case.

On its face, Rule 35 strictly limits the time within which a sentence may be reduced to "120 days after [the sentence] is imposed * * *." This time period "is jurisdictional and may not be extended." *United States* v. *Addonizio*, 442 U.S. 178, 189 (1979) (footnotes omitted); see also Fed. R. Crim. P. 45(b).[5] Despite Rule 35's plain language, most courts of appeals, as petitioner points out (Pet. 7, 9-10 & nn. 1 & 3), have allowed the district court to "retain[] jurisdiction for a reasonable time after the expiration of 120 days" in those "rare circumstances in which it is unable to decide the motion within the 120 day period." *United States* v. *Mendoza*, 581 F.2d 89, 90 (5th Cir. 1978) (en banc). In effect, these appellate courts have interpreted Rule 35(b) principally as a *filing* deadline, rather than a strict limit on the time during which the court may act on a motion for reduc-

[5] "[T]he court may not extend the time for taking any action under Rule[] * * * 35, except to the extent and under the circumstances stated in [it]."

tion of sentence. *United States* v. *Mendoza*, 581 F.2d 89, 90, adopting in relevant part the panel's opinion 565 F.2d 1285 (5th Cir. 1978); see also, *e.g.*, *United States* v. *Krohn*, 700 F.2d 1033, 1038 (5th Cir. 1983); *United States* v. *DeMier*, 671 F.2d 1200, 1205-1207 (8th Cir. 1982); *United States* v. *Rice*, 671 F.2d 455, 459 n.5 (11th Cir. 1982); *United States* v. *Smith*, 650 F.2d 206, 209 & n.2 (9th Cir. 1981); *United States* v. *Johnson*, 634 F.2d 94, 95 n.1 (3d Cir. 1980); *In re United States*, 588 F.2d 56, 60-61 (4th Cir. 1978), cert. denied, 441 U.S. 909 (1979); *United States* v. *Stollings*, 516 F.2d 1287 (4th Cir. 1975); but see *United States* v. *Kajevic*, 711 F.2d 767, 768-771 (7th Cir. 1983), cert. denied, No. 83-5536 (Jan. 9, 1984) (questioning validity of flexibly construing Rule 35's time limits); *United States* v. *Pollack*, 655 F.2d 243, 245 (D.C. Cir. 1980) (dictum).[6]

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[6] The District of Columbia Court of Appeals has interpreted D.C. Super. Ct. R. 35(b)—which is identical to Fed. R. Crim. P. 35(b)—as a "time limit on the power of the court to act" rather than as a filing deadline. *Thompson* v. *United States*, cert. denied, No. 83-5224 (Nov. 7, 1983); *United States* v. *Nunzio*, 430 A.2d 1372, 1374 (D.C. 1981). Florida and Texas also interpret rules limiting the time for reduction of sentence as barring court action after the time has elapsed. *State* v. *Adirim*, 376 So.2d 464 (Fla. Dist. Ct. App. 1979); *State ex rel. Bryan* v. *McDonald*, 642 S.W.2d 492 (Tex. Crim. App. 1982).

Other states, following the majority rule of the federal courts of appeals, interpret rules similar to Rule 35 as containing deadlines for filing motions for reduction of sentence. See, *e.g.*, *State ex rel. Owens* v. *Hodge*, 230 Kan. 804, 641 P.2d 399 (1982); *People* v. *District Court*, 636 P.2d 689, 690 n.3 (Colo. 1981) (en banc) (dictum); *State* v. *Upham*, 439 A.2d 912, 913 n.2 (R.I. 1982) (assuming but not deciding the issue); see also *Klimas* v. *State*, 75 Wis. 2d 244, 249 N.W.2d 285 (1977) (holding that trial court has discretion to reduce sentence even when the defendant's motion is untimely).

Whether or not the construction uniformly accorded Rule 35 by the various circuits is consistent with the apparently literal readings of the Rule by this Court in *United States* v. *Addonizio*, *supra*, and *United States* v. *Robinson*, 361 U.S. 220 (1960), this case was correctly decided: by any standard of "reasonableness" the district court exceeded its jurisdiction when it waited more than seven months, until after the Parole Commission had reached its final decision, before ruling on the motion to reduce sentence. Further review by this Court is accordingly not warranted.

Even assuming there is some jurisdictional flexibility under Rule 35, it must be strictly limited to avoid recreating the very problems the Rule is designed to avoid. Rule 35's limitation on the time during which a court may act serves the salutary purposes of promoting finality of result and guaranteeing that "trial courts will not inadvertently usurp the power of the parole board by making delayed rulings on motions to mitigate based on prison conduct." *Sotto* v. *Wainwright*, 601 F.2d 184, 192 (5th Cir. 1979), cert. denied, 445 U.S. 950 (1980); see *United States* v. *Inendino*, 655 F.2d 108, 109 (7th Cir. 1981); *United States* v. *Stollings*, 516 F.2d at 1289; 8A Moore, *Moore's Federal Practice* ¶ 35.02[2], at 35-8 (2d ed. 1983).[7] Those courts that have introduced the "reasonable time" exception to the Rule's jurisdictional limits have reached this result "so that defendants would not be penalized for delays that may result from a judge's absence, incapacity or preoccupation

[7] The court's power to reduce a lawful sentence must end at some point, since the authority to relieve a prisoner from punishment once imposed is vested in officials of the executive branch. See *Addonizio*, 442 U.S. at 188-190; *Ex parte United States*, 242 U.S. 27 (1916).

with an overcrowded calendar." *Inendino*, 655 F.2d at 110.[8] No more than a brief period can be considered "reasonable," lest the exception invalidate the rule. See, *e.g.*, *United States* v. *Stollings*, *supra* (4-day delay); *Leyvas* v. *United States*, 371 F.2d 714, 719 (9th Cir. 1967) (8-day delay). Under this standard, the court of appeals was certainly correct in concluding that an eventual delay of seven months for the sole purpose of monitoring the release decision of the Parole Commission patently exceeded the limits of this exception.

Nor does the instant result conflict with the decison in *United States* v. *DeMier*, *supra*. In that case, the sentencing judge erroneously relied on a set of superseded parole guidelines in calculating the appropriate sentence, and the prisoners subsequently filed a timely Rule 35 motion based on the existence of revised guidelines that indicated a longer period of incarceration than the judge had anticipated at the time of sentencing. Immediately thereafter, the judge indefinitely postponed all action on the Rule 35 motion, based on the prosecutor's representation that the Parole Commission might set a release date within the superseded guidelines upon which the judge had relied; when, after more than six months, the Parole Commission failed to do so, the judge reduced the prisoners' sentences to accord with his original sentencing intentions. In affirming the propriety of this reduction of sentence well after the expiration of Rule 35's 120-day period, the court of appeals stated (671 F.2d at 1207):

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[8] This rationale overlooks the fact that these problems are usually attributable to the defendant's own dilatoriness in waiting until just before expiration of the 120-day period to file the motion. See note 9, *infra*.

> The Government by its response to the Rule 35 motion invited the district court to stay its hand in ruling on the timely filed motion until after the Parole Commission had acted. * * * * * We cannot fault the district court for delaying its ruling on the Rule 35 motion pending final action by the Parole Commission where the Government resisted the granting of the motion on grounds that the Parole Commission could consider the [prisoners'] parole requests independently of the new guidelines.

In so holding, however, the court emphasized that its "determination that the district court acted within a reasonable time rest[ed] on the unusual facts presented in this case" (*id.* at 1207 n.16).

Here, in contrast to the "unusual facts" in *DeMier*, the government made clear in its original response that parole release decisions were exclusively committed to the Parole Commission and that, under *United States* v. *Addonizio*, *supra*, the district court's failed sentencing expectations could not provide a basis for undoing a previously imposed sentence (I C.A. App. 59). Despite this unequivocal response, the district court delayed action on petitioner's motion for seven months while awaiting the decision of the Parole Commission Appeals Board. The delay therefore directly usurped the authority, reserved to the Commission, of determining whether there existed good cause for continuing petitioner's period of incarceration beyond the parole guidelines. See *Ex parte United States*, 242 U.S. 27 (1916). Since maintaining the distinction between executive and judicial functions is a major purpose of Rule 35's time limitations, we submit that "[w]hen a district judge delays action on a Rule 35(b) motion till long after the ex-

piration of the 120 days, for the purpose or with the likely effect of assuming the function of the parole authorities, his delay is unreasonable" (*United States* v. *Kajevic*, 711 F.2d at 772). Accord, *United States* v. *Krohn*, 700 F.2d at 1039 ("Our final inquiry is into whether the district court in delaying action on the motion deliberately or effectively intervened in matters committed to the authority of the Parole Commission.").[9]

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[9] An additional consideration supports a finding of unreasonableness here. The trial court's failure to act on the motion before expiration of the 120-day period was caused, in part, by petitioner's decision to wait until 115 days after sentencing before filing the motion. As written, Rule 35 places the responsibility on the prisoner to file his plea for leniency with sufficient promptness so that the court may reasonably act on it before the 120-day period expires. See *Inendino*, 655 F.2d at 110. Indeed, the time limits of Rule 35(b) were extended in 1966 from 60 to 120 days expressly in order to provide a reasonable opportunity for a prisoner to present his plea in time for the court to act. As Fed. R. Crim. P. 35 advisory committee note states (emphasis added):

> The second sentence has been amended to increase the time within which the court may act from 60 days to 120 days. The 60-day period is frequently too short to enable the defendant to obtain and file the evidence, information and argument to support a reduction in sentence. Especially where a defendant has been committed to an institution at a distance from the sentencing court, the delays involved in institutional mail inspection procedures and the time required to contact relatives, friends and counsel *may result in the 60-day period passing before the court is able to consider the case.*

Having delayed until the 115th day before filing his motion, petitioner can hardly complain if the court loses jurisdiction to act not long thereafter.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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